AUG 26 1944
CHARLES ELMORE CROPLEY
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 399

THE FAIRMONT CREAMERY COMPANY, PETITIONER AND RESPONDENT BELOW,

V.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT AND PETITIONER BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LEONARD A. FLANSBURG,
CHARLES H. FLANSBURG,
Attorneys for Petitioner.
1404 Sharp Building,
Lincoln, Nebraska,

WEKESSER PUBLISHING CO., Law Briefs, Lincoln, Nebr.

INDEX

Subject Index

Page

Petition for writ of certiorari ---------- 1
Summary of matter involved ---------- 1
Jurisdictional statement ---------- 2
Question presented ---------- 3
Reasons relied on for allowance of writ ---------- 3
Prayer for writ ---------- 5
Brief in support of petition for writ of certiorari ----- 6
Opinion of court below ---------- 6
Jurisdiction ---------- 6
Statement of the case ---------- 7
Specification of errors ----------16
Argument ----------16
I. The decision is in conflict with the decisions in other Circuits ----------16
II. The decision involves an important question of Federal law which has not been but should be settled by this court ----------25
III. The decision involves a question of Federal law probably in conflict with applicable decisions of this court ----------25
Conclusion ----------26

Table of Cases Cited

Interlake Iron Corp. v. N. L. R. B.,
131 Fed. (2d) 129 ---------- 4, 22
N. L. R. B. v. Citizen-News Co., 134 Fed. (2d) 970- 4, 19
N. L. R. B. v. Goodyear Tire & Rubber Co.,
129 Fed. (2d) 661 ---------- 3, 18
N. L. R. B. v. Jones & McLaughlin Steel Corp.,
301 U. S. 1, 81 L. Ed. 893 ----------25

Page

N. L. R. B. v. Pick Mfg. Co., 135 Fed. (2d) 329 -- 4, 21
N. L. R. B. v. Riverside Mfg. Co.,
119 Fed. (2d) 302 ---------- 3, 20
N. L. R. B. v. Sun Shipbuilding & Dry Dock Co.,
135 Fed. (2d) 15 ---------- 4, 18
N. L. R. B. v. Tex-O-Kan Flour Mills Co.,
122 Fed. (2d) 433 ---------- 3, 17
N. L. R. B. v. Thompson Products,
97 Fed. (2d) 13 ---------- 4, 20
Pennsylvania R. R. Co. v. Chamberlain,
288 U. S. 333, 77 L. Ed. 819 ---------- 4, 26

Table of Statutes Cited.

Judicial Code, Section 240 (a) (28 U. S. C. A.,
Sec. 347) ---------- 3, 6
National Labor Relations Act, Section 8 (3)
(29 U. S. C. A., Sec. 158 [3]) ---------- 7
National Labor Relations Act, Section 10 (e),
(29 U. S. C. A., Section 160 [e]) ---------- 2, 3, 6, 7
Supreme Court Rule 38 (5) [b] ---------- 4

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. ----------

THE FAIRMONT CREAMERY COMPANY, PETITIONER AND RESPONDENT BELOW,

V.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT AND PETITIONER BELOW.

PETITION FOR CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

STATEMENT OF THE MATTER INVOLVED.

This case was commenced in the Circuit Court of Appeals for the Tenth Circuit on the original petition

of the National Labor Relations Board against The Fairmont Creamery Company, under the provisions of Section 10 (e) of the National Labor Relations Act (29 U. S. C. A., Sec. 160 [e]), to enforce by decree of court an order of the National Labor Relations Board for reinstatement, with back pay, of Ardis Dye and Victor McDaniel, two employees of The Fairmont Creamery Company, who had previously been discharged by the Company.

The testimony on behalf of The Fairmont Creamery Company evidenced a clear and valid ground of discharge, which was because of repeated and wilful absence from work without excuse. That the discharge was upon this ground, and immediately occasioned by an inexcusable absence in each instance, is proven by the uncontradicted and unimpeached testimony given on behalf of the Company.

The court found that the two employees were members of a labor union and had engaged in union activities, and though there is no evidence to connect their discharges with any such ground, the court drew the inference, in face of the uncontradicted and unimpeached proof that the employees were discharged on other and valid grounds, that the employees were discharged because of Union membership or activity.

That decision based upon an inference refuted by clearly proven facts is directly contrary to the law established by decisions in other Circuits.

JURISDICTIONAL STATEMENT.

It is contended that the Supreme Court has jurisdiction to review the decree here in question, under the pro-

visions of the National Labor Relations Act, Section 10 (e) (29 U. S. C. A., Sec. 160 [e]), providing for the review of such decisions by certiorari, and under Section 240 (a) of the Judicial Code (28 U. S. C. A., Sec. 347), providing for this method of review.

QUESTION PRESENTED.

The question presented herein is, can the Board or the court infer when the employee is a member of the Union or has engaged in Union activity, without further showing of any connection between such membership or activity with his discharge, that he was discharged on such a ground, when the uncontradicted and unimpeached testimony of the employer shows that he was discharged because of wilful and inexcusable absence from work.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals, which gives effect to an inference that the discharge of the employees was because of Union membership or activity, an inference contrary to the uncontradicted and unimpeached testimony in behalf of the Company that the discharge was because of inexcusable absences, is a decision in conflict with decisions on the same matter of several Circuit Courts of Appeal, as follows: In the Circuit Court of Appeals for the Fifth Circuit in the cases of *N. L. R. B.* v. *Tex-O-Kan Flour Mills Co.*, 122 Fed. (2d) 433, and *N. L. R. B.* v. *Goodyear Tire & Rubber Co.*, 129 Fed. (2d) 661, and *N. L. R. B.* v. *Riverside Mfg. Co.*, 119 Fed. (2d) 302; in the Circuit Court of Appeals for the Third Circuit in the case of *N. L. R. B.*

v. *Sun Shipbuilding & Dry Dock Co.*, 135 Fed. (2d) 15; in the Circuit Court of Appeals for the Ninth Circuit in the case of *N. L. R. B.* v. *Citizen-News Co.*, 134 Fed. (2d) 970; in the Circuit Court of Appeals for the Sixth Circuit in the case of *N. L. R. B.* v. *Thompson Products*, 97 Fed. (2d) 13; and in the Circuit Court of Appeals for the Seventh Circuit in the cases of *N. L. R. B.* v. *Pick Mfg. Co.*, 135 Fed. (2d) 329, and *Interlake Iron Corporation* v. *N. L. R. B.*, 131 Fed. (2d) 129. (Supreme Court Rule 38 (5) [b]).

2. The decision of the Circuit Court of Appeals, which gave effect to an inference that employees were discharged because of Union membership or activity, when other valid grounds are clearly proven by uncontradicted and unimpeached testimony, involves an important question of federal law which has not been, but should be, settled by this court. (Supreme Court Rule 38 (5) [b]).

3. The decision of the Circuit Court of Appeals in giving effect to such an inference of fact, when a contrary state of facts has been directly proven by uncontradicted and unimpeached testimony, is a decision on a question of federal law probably in conflict with applicable decisions of this court, particularly the decision in *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333, 77 L. Ed. 819. (Supreme Court Rule 38 (5) [b]).

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the

proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 2861, *National Labor Relations Board, Petitioner* v. *The Fairmont Creamery Company, Respondent,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the decree herein of said Circuit Court of Appeals for the Tenth Circuit ordering reinstatement of said two employees be reversed by the court, and for such further relief as to this court may seem proper.

Dated this 21 day of August, 1944.

Respectfully submitted,

THE FAIRMONT CREAMERY COMPANY,

By Leonard A. Flansburg

Charles H. Flansburg

Attorneys for Petitioner.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. _____

THE FAIRMONT CREAMERY COMPANY, PETITIONER AND RESPONDENT BELOW,

V.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT AND PETITIONER BELOW.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit was issued on July 3, 1944, in case No. 2861, not yet reported. The opinion is printed in full in the record (R. 419).

JURISDICTION.

The statutory provisions which are believed to sustain the jurisdiction of this court are Section 10 (e) of the National Labor Relations Act (29 U. S. C. A. Sec. 160 [e]), and Section 240 (a) of the Judicial Code (28 U. S. C. A., Sec. 347).

Judgment was entered in this case by the United States Circuit Court of Appeals for the Tenth Circuit on July 17, 1944. Petition for rehearing was denied and the decree became final on July 29, 1944.

STATEMENT OF THE CASE.

The National Labor Relations Board, on August 23, 1943, issued an order commanding the defendant, The Fairmont Creamery Company, at its plant in Dodge City, Kansas, where it is engaged in the business of manufacturing and processing and selling butter, milk and other dairy products, to reinstate two employees, Ardis Dye and Victor McDaniel, who had been discharged by the Company. As a basis for this order the Board had found that these two employees were discharged in violation of Section 8 (3) of the National Labor Relations Act (29 U. S. C. A. Sec. 158 [3]) because of Union membership or Union activity (R. 32, 33, 34, 49).

In order to enforce the order, the Board, on November 27, 1943, filed its original petition in the Circuit Court of Appeals for the Tenth Circuit, under the provisions of Section 10 (e) of the National Labor Relations Act, permitting of such action (29 U. S. C. A., Sec. 160 [e]).

The Court entered a decree ordering reinstatement. All other orders in the Court's decree, except as to reinstatement of these two employees, have now been complied with by the Company. Review is sought only as to that part of the decree requiring reinstatement of these two employees.

The evidence on behalf of the Company stands clear and unrefuted by testimony that is unimpeached that Ardis Dye and Victor McDaniel were discharged because of misconduct in absenting themselves from work. On the other hand, there is no evidence in the record whatever to show any connection or relation between Union membership or Union activity with such discharges, and in fact the evidence is most meager as to a showing of any knowledge on the part of the Company that these employees were Union members or had engaged in any Union activity.

Ardis Dye was employed in the creamery department; she handled the machine for bottling the milk. There were fifty-two employees in that department and the bottling machine was required to be operated continuously in order that the entire department function (R. 298). Sixty-seven per cent of the Company's product went to the Army and the Navy. Continuous operation was necessary.

The milk department was a seven-day a week operation. Mrs. Dye, when employed, had asked for continual employment. At the time of her employment it was understood that she could later return to Denver for a week, from where she had come, in order to straighten out her affairs. She took that leave and remained there two days longer than the time agreed upon, without notice or permission (R. 171, 293). On two subsequent occasions she asked for three days off and was each time granted leave (R. 163, 293), but the foreman told her that they could not give her so much time off (R. 293, 294). On April 24, 1943, she asked for three days' leave, saying unless the leave was given she

would quit (R. 171). This leave was granted, but without notice or permission she overstayed that leave two days, returning about May 1, 1943 (R. 172 and Respondent's Exhibit 1, p. 413). That was about the time that active organization of the Union had commenced at the plant (R. 74, 75).

On May 8, a Saturday, Mrs. Dye did not appear for work at all. A boy friend on leave from the Army was visiting her and she sent word by a fellow employee that she would not be at work until noon. The train on which her boy friend was to leave was late and so, she testified, she did not return at all (R. 172, 294). She absented herself for the whole day of Saturday without permission. She returned to work the next morning, Sunday, and when she started to speak to Carey, the foreman, about it, he cut her off and said it is getting so "I cannot depend upon you any more" (R. 176, 296).

This absence was reported to the manager, Evert, and he told Carey to discharge her (R. 302).

Carey testified that his work was so heavy on Sunday that he did not discharge her on that day, but waited until the next morning, and that he was delayed in seeing her the next morning, because one of the girls in the department broke her leg, but that about 9:00 o'clock, May 10, he saw Mrs. Dye and told her that she was being discharged (R. 296). The termination of employment slip was presented to her stating the grounds of the discharge as "outside interest making her absent from work when needed" (Respondent's Exhibit 2, R. 413-414). This discharge slip was presented to her and she signed it without objection and left the plant. The slip contained a blank in which the employee is permitted to

make any explanation. This she did not fill out. The slip which was signed by her also contained this statement: "I hereby acknowledge receipt of final wages due me and certify that the foregoing is a true statement of the reason or cause for the termination of my employment."

The foreman, Carey, then asked another employee in the creamery department to operate the bottling machine, telling her that Mrs. Dye had been discharged because, as the employee testified, "she wasn't working all the time and didn't ask to get off, that she just took off" (R. 224, 298). Mrs. Dye *herself* told another employee that "she had been laid off because she delayed the work by too many absences and the Company could not depend on her" (R. 370).

Mr. Evert, the manager, testified that he told Carey to discharge her for being absent (R. 240) and that Mrs. Dye was discharged for "absenteeism" (R. 242). Mr. Crilly, personnel officer, made out the termination of employment slip (R. 310). These three were the only representatives of the Company who had anything to do with her discharge. Mr. Evert (R. 242) and Mr. Carey (R. 297) and Mr. Crilly (R. 311) all testified they had no knowledge of any Union relationship or activity on the part of Mrs. Dye at the time she was discharged.

All of the foregoing testimony stands without dispute.

On the basis of Mrs. Dye's testimony (R. 177) the Court found (Opinion R. 425) that she had joined the Union on May 6, 1943, and by May 9 had enrolled fifteen of her fellow employees in the Union. She testified that none of the solicitation of employees was done during

working hours and there is no showing that any of it was done in the presence of or brought to the attention of any foreman or officer (R. 170). The Court also found, as Mr. Richardson testified (R. 70), that an assistant foreman, Briggs, saw Mrs. Dye with some fellow employees, among whom was Richardson, known to be a Union member. They were standing in front of a grocery store known as the Pay Day Market (R. 70). Mr. Richardson testified that assistant foreman Briggs asked the group what kind of a party they were on and Richardson answered it was a "charivari." The Court found that on May 10 the manager, Evert, asked Richardson how he had fared at the Union meeting. Richardson answered there had been no Union meeting (R. 76).

From this testimony the Court has decided (Opinion R. 425, 427) that the Company must have *known* of Mrs. Dye's membership in the Union and of her enrolling fellow employees, apparently because she was seen among a group of fellow employees, one of whom was known to be a Union member, and further, and in face of the undisputed and unimpeached testimony that her discharge was because of a willful absence from work without permission, when she had also absented herself in the past without leave, decided that her discharge must be inferred to have been on the ground that she was a Union member or engaged in Union activity.

Victor McDaniel worked in the hatchery department. The hatchery was provided with two incubators for hatching 150,000 eggs. There were five people employed in the department, and March, April, May and June are the heaviest months. McDaniel had worked for the Company before. He owned a small tract of five acres

away from town where he had some livestock, chickens and a garden. During his previous employment he continually asked for time off and finally, when the manager told him that the Company would not put up with it, McDaniel quit (R. 243).

Later he came back and was re-employed, in August, 1942. From that time until May 8, when he was discharged, he had asked for and was given time off on twenty-two different occasions (Respondent's Exhibit 3, p. 414). The work was heavy in the department, and when he was gone the work would get behind and those who were working had to double up (R. 325). These absences were reported to Evert, the manager (R. 331 and 244), and Evert told Harris, the foreman of the hatchery department, that the Company could not put up with such absences. Harris felt compelled to allow the absences in order to hold the employee (R. 326). On May 6th, McDaniel took half a day off and on the same day asked Harris for, and was given, Saturday, May 8th, off so that "he could haul feed to his livestock." Saturday was a busy day when the farmers come in to buy feed and chicks (R. 248). It happened that a load of feed had to be delivered from the hatchery that day and Evert, the manager, called upon Harris for a man to deliver it, asking for McDaniel (R. 247, 326). Harris told him that McDaniel was off and that there was no man available. Evert asked why McDaniel had been given the day off and the foreman answered that it was to haul feed. Evert said: "I thought I told you to see that that stopped." The foreman answered that he had to get along with him and that he didn't want to be hard on him because he needed men badly, so nothing further was done at that time (R. 247).

During the day, however, Evert was told that McDaniel was seen around down town. He believed that McDaniel was taking time off unnecessarily in order to have a Saturday afternoon off down town, and Evert called him in and, when McDaniel admitted he had finished hauling feed by 1:00 o'clock (R. 274, 147, 148), discharged him (R. 247). That such was Evert's belief, that McDaniel was taking Saturday noon off without necessity, and that such was the real ground of the discharge is fully substantiated by the express finding of the National Labor Relations Board. The finding (R. 33) reads as follows:

> "Evert had learned from Foreman Harris that McDaniel had secured the day off to haul feed. Evert had also received word that McDaniel had been seen uptown. Evert thought that McDaniel was not hauling feed but was just taking Saturday afternoon off, so he sent for him. When McDaniel arrived at Evert's office, Evert told McDaniel that he would not be able to use him any more because he was not doing what he had asked time off to do, and because he was taking too much time off."

A termination of employment slip was made out setting forth the ground for discharge as "misconduct, absenteeism and outside interests" (Respondent's Exhibit 4, R. 415). A blank was provided wherein the employee could set forth any explanation. It also contained the recital: "I hereby acknowledge receipt of final wages due me and certify that the foregoing is a true statement of the reason or cause for the termination of my employment." McDaniel signed this slip without objection.

Shortly before this Evert had discharged Freda Holloway on the same ground, for taking too much time off (R. 286).

In explanation of why Evert had not discharged McDaniel sooner, he testified (R. 284):

> "A. Well, simply because we were busy and we try to do everything rather than discharge them. But, if it comes up to a point of where you simply have got to maintain your organization and you have got to show that these days of absence will not be tolerated, where you simply don't have the right kind of operation of the plant, and you can't proceed with your production and your entire department is running into trouble, you just can't do it."

The foregoing testimony regarding the discharge of McDaniel stands without dispute in the record.

On the day that McDaniel was absent, May 8, there was testimony that Harris, the foreman, asked one of the employees in the hatchery department if McDaniel was pushing the Union. The employee replied "not that he knew of" (R. 333). This witness said that Harris stated he had heard in a roundabout way that McDaniel was pushing the Union. Harris testified he did not know of any Union membership or Union activity on the part of McDaniel. If Harris had heard anything in a roundabout way, whether he could rely upon it or not, he was not actuated by it. There was no testimony that Harris made any such report to Evert and the record shows that Harris did not recommend the discharge of McDaniel (Board's finding, R. 33). He had nothing to do with the discharge (R. 336).

There is no showing that Evert, who discharged McDaniel, knew that McDaniel had joined the Union or had been active in it.

McDaniel's testimony at the time of the hearing was that he had joined the Union on April 23 (R. 146) and

that he had talked to some employees about joining the Union. There was no showing that any officer of the Company knew of this, and Harris, the foreman, would not have asked an employee in his department if McDaniel was a member of the Union or was pushing it had he known such was a fact.

The court in its decision (R. 425, 427) drew the inference that this testimony was sufficient not only to show knowledge on the part of the Company of the Union membership and activity on the part of McDaniel but also to justify an inference that the discharge of McDaniel was because of Union membership and activity though the uncontradicted and unimpeached testimony in the record refutes such an inference and shows clearly that McDaniel was discharged because of taking too much time off and because of the belief on the manager's part, as found by the Board, that McDaniel was spending his Saturday afternoon needlessly down town.

Neither Ardis Dye nor Victor McDaniel were under any misgivings as to the reasons for their discharge. Had they felt that they were discharged on any ground other than the ground given them, they would have entered such statements in the termination slips. They made no objection. They realized that the discharges were proper and just.

On the fact alone of Union membership and Union activity, shown by the testimony of these two employees, the court inferred that such was the ground of discharge, thus allowing its inference to override the clear, uncontradicted and unimpeached testimony that the discharge was grounded on absences from work. In doing this the court in its opinion said (R. 427):

> "While the evidence was conflicting and would have supported a finding that the discharges were for reasons other than Union membership and activity, other evidence and legitimate inferences which could be drawn therefrom were sufficient to support the findings of the Board."

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Tenth Circuit erred in basing its decision on an inference, that employees were discharged because of Union membership or activity, drawn from the fact alone that the employees were members of the Union or had engaged in Union activity, when such an inference was refuted by clear, uncontradicted and unimpeached proof that the discharges were grounded upon the employees absenting themselves from work.

ARGUMENT.

I.

The rule, established by decisions in other Circuits, is that if an employee's Union membership or activity is shown, and he is discharged, when no other reason is apparent, then Union membership or activity may logically be inferred as the ground for discharge, but though Union activity or membership be shown, if another clear and justifiable ground for discharge appears, and there is testimony, standing uncontradicted and unimpeached, that the discharge was on that ground, there is no room for inference that the discharge was on any other ground than the one shown, and it cannot then be legitimately inferred that the discharge was based on Union membership or activity.

The decision of the Circuit Court of Appeals for the Tenth Circuit is directly in conflict with decisions on the same subject in other Circuits, as follows:

In *N. L. R. B.* v. *Tex-O-Kan Flour Mills Co.*, 122 Fed. (2d) 433 (5th Circuit), the court set aside the findings of the Board that employees had been discharged because of union activity, when union membership and activity had been shown, but where the evidence showed another definite and reasonable ground for discharge, and the company's representatives testified that such was the ground for which the employee was discharged.

The court said that mere hostility to the union on the part of the company and membership in the union on the part of the employee was not sufficient upon which to rest an inference that the discharges were discriminatory, when reasonable grounds for discharge were shown and supported by testimony which stood unimpeached.

The court said:

> "There is no doubt that each employee here making complaint was discharged, or if laid off was not re-employed, and that he was at the time a member of the union. In each case such membership may have been the cause, for the union was not welcomed by the persons having authority to discharge and employ. If no other reason is apparent, union membership may logically be inferred. Even though the discharger disavows it under oath, if he can assign no other credible motive or cause, he need not be believed. But it remains true that the discharger knows the real cause of discharge, it is a fact to which he may swear. If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him,

> or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point. This was squarely ruled as to a jury in Pennsylvania R. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819, and the ruling is applicable to the Board as fact-finder."

Following that decision the Fifth Circuit Court of Appeals, under similar circumstances, in *N. L. R. B.* v. *Goodyear Tire & Rubber Co.*, 129 Fed. (2d) 661, set aside the order for reinstatement of employees who had been discharged on definitely proven grounds, saying:

> "* * * the ultimate findings or inferences of the Board were based on nothing more than that the evidence showed antipathy to United, and the persons discharged in each case for an assigned cause, were members of or applicants for membership in United. This will not at all do. Nothing is better settled in the law than that while discharges may not be made because of and to discourage union membership or activity, membership in a union is not a guarantee against discharge, nor does the fact alone, that an employer dislikes a union or a union man, prevent his exercising his undoubted right to discharge. Findings of the Labor Board just as findings of a jury, must rest upon evidence, not surmise or suspicion, * * *"

In *N. L. R. B.* v. *Sun Shipbuilding & Dry Dock Co.*, 135 Fed. (2d) 15 (3rd Circuit), the court refused to sustain the Board's finding that an employee had been discharged on the ground of alleged union activity.

The employee had been openly active in the union campaign. He was discharged for absenteeism. The employee was seen standing beside a fire and was ordered

to go back to his work, which he did reluctantly. He was handed a pink slip, which was a warning that his work was unsatisfactory. That afternoon the foreman returned and Faunce was not at his place of work. The foreman waited for half an hour before Faunce returned, five minutes before quitting time. Faunce was discharged because of being absent from his work.

The court held that the circumstances were insufficient to show discriminatory action against the employee, and that the employer was warranted in discharging him. The Board's order of reinstatement was set aside.

The court said:

> "The duty to find the facts does not carry with it the prerogative of raising suspicion to the status of fact or of basing inferences upon mere speculation. Cf. National Labor Relations Board v. Columbian Enameling & Stamping Co., supra, 306 U. S., at page 300, 59 S. Ct. 501, 83 L. Ed. 660."

In *N. L. R. B.* v. *Citizen-News Co.*, 134 Fed. (2d) 970 (9th Circuit), an employee had been discharged by the company for inefficiency and low production. The evidence showed that the employee was discharged shortly after he had circulated a petition for the union.

The Board held that the discharge was discriminatory and was because of union activity, in that the employee had circulated the petition for the inclusion in the union of employees in a certain department.

The court set aside the order of the Board for lack of evidence, pointing out that no other employee was discharged because of the petition, although it was prepared by another employee, who was very active in the union.

The court in the opinion said:

> "The mere discharge of an employee with or without reason is therefore not evidence of intent to affect labor unions or the rights of employees under the National Labor Relations Act.
>
> * * *
>
> "Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding.
>
> "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities. There must be more than this to constitute substantial evidence."

In *N. L. R. B.* v. *Thompson Products,* 97 Fed. (2d) 13 (6th Circuit), an employee was discharged for having taken a small lamp from the company's property. It was shown that he had attended a union meeting. The Board found that his discharge was discriminatory because of union activity.

The court held that to hold the employee "was discharged because of his union activities is to give weight to an inference in the teeth of uncontradicted testimony to the contrary," and set the order of the Board aside.

In *N. L. R. B.* v. *Riverside Mfg. Co.,* 119 Fed. (2d) 302 (5th Circuit), the court said of a discharge:

> "The only facts found which at all tend to support the Board's conclusion that he was discharged for union activity are that he was a member of the union, and the management did not like the union or his belonging to it, and had said so. If real grounds for discharging him had not been shown,

> or if he had been discharged for trivial or fanciful reasons, these facts would have supported an inference that he was discharged for union activity, but when the real facts of the discharge appear, these facts are stripped entirely of probative force. For it is settled by the decisions that membership in a union is not a guarantee against discharge, and that when real grounds for discharge exist, the management may not be prevented, because of union membership, from discharging them."

In *N. L. R. B.* v. *Pick Mfg. Co.*, 135 Fed. (2d) 329 (7th Circuit), the company had a history of anti-union activity. The testimony showed that the officers of the company had told employees that at one time, when there was a campaign for unionization, some of the employees had lost their jobs, and the same thing might happen again; also warned the employees how they should vote, otherwise they might be on the outside looking in; also that the company might adopt undesirable practices with reference to transfers during slack periods. One employee was told that if he "should be 100% with the Independent Union" he would be all right. A cease and desist order was sustained.

One of the employees, Matenaer, was discharged on the ground that he had negligently broken a die. The Board made a finding that the discharge was discriminatory and was based on union activities. The employee had been active in the organization of the union but held no office or prominent position, and there was no evidence that any official of the company knew of the employee's union relationship.

The court held that the finding of the Board, under such circumstances, could not be sustained.

The opinion of the court sets forth the facts and the conclusion of the court as follows:

> "Norbert Matenaer was discharged on July 26, 1939, after having served six years with the respondent. He was active in the organization of the Union, but held no office nor prominent position therein. There is no evidence in the record that any official of the company knew that Matenaer belonged to the Union. He was discharged, as the respondent contended, because he had negligently broken a die. There is no dispute but that he broke the die, and he did it through his own carelessness. Matenaer had no illusions as to why he was discharged, and testified that he was discharged because he was careless in running the press and because of his carelessness he had 'chipped up a die.'
>
> * * *
>
> "It thus appears that the Board has inferred that Matenaer's discharge was because of his Union activities, when there is no evidence in the record that the officials of the respondent knew that Matenaer belonged to the Union. Even if there were evidence that his membership was known to the officials of the respondent, that in and of itself would not be substantial evidence to warrant the Board's inferring that he was discharged because he was a member of the Union. We think there is not only no evidence to support the finding of the Board that Matenaer was discriminatorily discharged, but we think the undisputed and only credible evidence in the record is to the effect that he was discharged because he had carelessly broken a die, that he well understood that to be the cause for his discharge, and that he accepted the verdict without any reservation and went ahead to establish himself as a tavern keeper."

In *Interlake Iron Corporation* v. *N. L. R. B.*, 131 Fed. (2d) 129 (7th Circuit), the company had a history of

hostility to the union. When its business was low it laid off a large number of employees. It had established a merit system, and laid the employees off in the order of their lower rating. One Bulich was laid off ahead of others, who were of lower rating than he. He had been wearing a button around the plant, so that he was known to be a union member.

The assistant superintendent saw another employee wearing a button, and said, "Ah! watch your step."

The Board inferred that the superintendent was hostile to the union, and inferred that Bulich was discriminated against in the discharge, because he was discharged ahead of three men of lower ratings.

The court set the order aside as not supported by sufficient evidence.

The court said:

> "The company does not have to prove non-discrimination because of union activities. The Board must prove discrimination because thereof. This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board."

Pointing out that the findings of the Board were based entirely on speculation and suspicion, and without reasonable inferences necessarily springing from the evidence, the court said:

> "When inferences are reasonably drawn they constitute evidence and must be accepted by the courts as such and inferences alone may, if reasonable, provide a link in the chain of evidence and constitute in that regard substantial evidence. But

> an inference cannot be piled upon an inference, and then another inference upon that, as such inferences are unreasonable and cannot be considered as substantial evidence. Such a method could be extended indefinitely until there would be no more substance to it than the soup Lincoln talked about that was 'made by boiling the shadow of a pigeon that had starved to death.' * * * The mere fact that the company had a background of hostility to the union in and of itself does not show discrimination in hiring and firing under Section 8 (3). If it did, then every case of Section 8 (1) violation would be a violation of Section 8 (3) if any employee had been discharged."

These cases from other Circuits hold, in the first place, that Union activity or membership cannot be left to inference or speculation, and that actual knowledge of such activity must be shown by the record before it can be said that such activity had any relation to the discharge; and these cases further say that even though knowledge of Union membership and activity is shown, and even though a history of hostility to the Union appears from the record, where a valid ground of discharge appears, and the discharge is directly related to such valid ground, that the court cannot infer or suspect or speculate that the discharge was on another ground, that is, on the ground that the member belonged to the Union or had engaged in Union activity.

Any other rule would absolutely tie the hands of every company from making a discharge of an employee, on any valid ground, if the employee belonged to a union or had been active in it. Membership in a Union is not a guaranty against discharge.

II.

The decision of the Circuit Court of Appeals involves an important question of Federal law which has not been but should be settled by this court.

The National Labor Relations Act was not intended to interfere with the normal exercise of the right of an employer to discharge his employees. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893. Yet throughout the Tenth Circuit, if this decision is allowed to stand, no employer having a valid ground for discharge of an employee can exercise his right of discharge when the employee is a member of the Union or is actively engaged in Union matters for the reason that the National Labor Relations Board is given the legal right to infer, if this decision stands, that the discharge was because of Union relationship and can require the employee to be reinstated. Unless this decision is reversed it establishes such a rule governing all employers throughout the Tenth Circuit.

III.

Although the Supreme Court has never passed upon the question presented here which involves the right of an employer to discharge an employee for valid cause, and determining the force which may be given to any inference arising from the fact alone that the employee is a member of or active in a labor union, it was held that an inference of the existence of a particular fact from other proven facts is not permissible in the face of positive and otherwise uncontradicted and unimpeached testimony consistent with the facts actually proved, from which testimony it affirmatively appears that the fact

sought to be inferred did not exist. *Pennsylvania R. R. Co.* v. *Chamberlain,* 288 U. S. 333, 77 L. Ed. 819. The decision of the Circuit Court of Appeals is in principle directly in conflict with the declaration of law announced by this court in that case.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

THE FAIRMONT CREAMERY COMPANY,

By Edmund A. D'Oench

Edmund H. D'Oench

Counsel for Petitioner.

SEP 22 1944
CHARLES ELMORE CROPLEY
CLERK

No. 399

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE FAIRMONT CREAMERY COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	8
Conclusion	10
Appendix	11

CITATIONS

Cases:

International Association of Machinists v. *National Labor Relations Board*, 311 U. S. 72 9

National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584 9

National Labor Relations Board v. *Nevada Consolidated Copper Corporation*, 316 U. S. 105 9

Virginia Electric and Power Co. v. *National Labor Relations Board*, 319 U. S. 533 9

Statute:

National Labor Relations Act of July 5, 1935, c. 372, 49 Stat. 449 (29 U. S. C., Supp. V, Secs. 151 et seq.):

Sec. 7 11

Sec. 8 (1) 9, 11

Sec. 8 (3) 9, 11

609740—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 399

THE FAIRMONT CREAMERY COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 419–427) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 12–44, 48–51) are reported in 52 N. L. R. B. 75.

JURISDICTION

The decree of the court below (R. 428–429) was entered on July 17, 1944. The petition for rehearing filed by petitioner was denied on July 29, 1944 (R. 452). The petition for a writ of

certiorari was filed on August 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether there is substantial evidence to support the Board's finding that petitioner unlawfully discharged employees Dye and McDaniel because of their union membership and activities.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, p. 11.

STATEMENT

Upon the usual proceedings, the Board on August 23, 1943, issued its findings of fact, conclusions of law, and order (R. 12–44, 48–51). The relevant facts found by the Board may be summarized as follows:[1]

A. *The background of the discharges.*—The unionization of petitioner's plant was begun shortly before September 12, 1942 (R. 15, 49; 64). On that day Leroy Black, one of petitioner's employees who was a member of the Chauffeurs, Teamsters, and Helpers Union, affiliated with the

[1] In the following statement, the references preceding the semicolon are to the Board's findings and the succeeding references are to the supporting evidence.

American Federation of Labor, distributed Union pamphlets at petitioner's garage (R. 15; 63–65, 158). Shortly thereafter Evert, petitioner's plant manager (R. 15; 64), came into the garage and, noting that employee Perley had Union literature in his hand, asked Perley where he had obtained such literature (R. 15; 64–65, 158–159, 234–235, 285). Perley replied that Black had given it to him (R. 15; 234–235), whereupon Evert called Black and Perley "bolsheviks" and said, "If you can't kick them damn cusses out of here, I can" (R. 15; 65). Black and Perley then expressed dissatisfaction with the wages which they were receiving (R. 15; 65, 64, 67, 236). Evert told Perley he could get his time whenever he wished (R. 15–16; 67). Black quit immediately, and Perley left the next morning (R. 16, 236, 66–67). The following day Evert agreed to increase the wages of two other employees, Richardson and Crane, who had witnessed the events of the preceding day, and promised to give them a bonus if they would remain in petitioner's employ (R. 16; 66–68). Evert by his actions succeeded in ending further efforts of petitioner's employees to organize until the spring of 1943 (R. 16; 68–69).

On May 1, 1943, Richardson obtained some Union applications from Ivan Hibbard, whose father ran a local market (R. 16; 68–69, 122–123). Richardson gave some of the blanks to Ardis Dye

and Lawrence Black[2] (R. 17; 68–69). Evert, having heard of Hibbard's activities, endeavored to persuade Hibbard's father to prevail upon his son to stop his Union activities (R. 27; 124–125). When the latter refused, petitioner terminated its business relations with Hibbard's father (R. 27; 122–128, 131). Thereafter, on May 8, Evert injected himself into the employees' organizational efforts by asking employee Crane to find out the employees' attitude toward the Union (R. 17; 155–156), by interrogating employee Smalley concerning Union activities, and by expressing approval when Smalley advised him that he had not joined the Union (R. 17–18; 184). Evert questioned employee Barnes and endeavored to have him withdraw from the Union, advising him that most of the employees to whom he [Evert] had talked were ready to resign (R. 18–19; 85). Evert also sought to disparage the Union in the eyes of Barnes by advising him that it could not secure a wage increase because wages were frozen, that if the men joined the Union their earnings would suffer because the Union would insist on shorter hours, and that the employees would have to pay all their own truck expenses (R. 18–19;

[2] Lawrence Black, one of petitioner's truck drivers, was discharged by Evert on May 15, 1943, under circumstances which the Board found were violative of Section 8 (3) and (1) of the Act (R. 37–40). The Board's findings with relation to this discharge were upheld by the court below, and petitioner raises no questions here with respect to Black's discharge.

85–86). On the same day Evert addressed similar arguments to employee Mayfield and asserted that if the Union were successful Mayfield would be permanently assigned to an undesirable country run (R. 19; 191–192).

On May 15, Evert called Barnes to his office, interrogated him in the presence of several of the petitioner's department heads, accused him of having engaged in Union activities while on duty, and said, "You haven't got sense enough to know what you are trying to pull" (R. 26; 89–91). Evert then called Barnes an opprobrious name, stating that it also applied to other members of the Union (R. 26; 90), and threatened to discharge him (R. 26; 89–91). Petitioner also engaged in surveillance of a Union meeting held on May 11, 1943 (R. 23–24; 72–73, 198–199, 209–210, 214–215, 341–342, 347–348); it withdrew from the employees privileges previously accorded them by forbidding them to leave the plant during ten-minute rest periods in mid-morning and mid-afternoon (R. 27–29; 261–262); and, having thus confined the employees to its premises, petitioner posted a notice which further hindered their organizing activities by restricting their conversations or activities on Company time or property to those necessary to perform their regular work (R. 27–29; 261–262, 411).

B. *The discharges.*—Petitioner discharged employees Victor McDaniel and Ardis Dye on May 8 and 10, respectively (R. 32, 34, 147, 58).

Victor McDaniel was a trained hatchery man, admittedly a difficult employee to replace (R. 33–34; 327).[3] He joined the Union on April 23, 1943, and solicited members for it among his fellow-employees (R. 34; 146). On the day of his discharge his foreman, Harris, inquired of employee Simmons "if McDaniel was pushing the Union," stating that he had heard that he was (R. 34; 179). On May 6, 1943, McDaniel requested and received permission from Foreman Harris to be absent from his work on May 8 in order to haul feed for his livestock on a small farm which he owned (R. 32–33; 146–147). After attending to the hauling of the feed McDaniel went to petitioner's plant at about one p. m. in order to get some grain which he had purchased (R. 33; 147). He was then called to Evert's office and discharged because, it was claimed, he was not utilizing the time given him for the purpose intended, and because of his excessive absences (R. 33; 147). Foreman Harris admitted, however, that McDaniel had never been absent from work without permission; that he had not recommended McDaniel's discharge; and that he had retained McDaniel in spite of occasional absences because it was difficult to replace a man of McDaniel's qualifications (R. 33–34; 335–336, 337).

[3] McDaniel was employed by petitioner intermittently for four or five years prior to his discharge (R. 144).

Ardis Dye was discharged on May 10, 1943, the reasons given her at the time being that her work was unsatisfactory, that she lacked interest in her work, and was absent excessively. At the hearing, however, petitioner introduced no evidence to support the contention that her work had been unsatisfactory (R. 34). She operated a bottling machine in petitioner's creamery department, a position of admitted responsibility (R. 34; 163). Mrs. Dye is the mother of two small children, and at the time of her employment Foreman Carey agreed to give her leave of absence to arrange for the care of her children (R. 35; 160–163). In March and April of the same year she was given further time off for the same purpose (R. 35; 163–164–165). None of these absences was considered by petitioner when they occurred to have been other than legitimate and justified (R. 35–36; 162–165, 174). On May 8, 1943, Dye asked her roommate, Olive Owston, to inform Foreman Carey that she would not be in to work that day until after the departure of the 12:45 p. m. train (R. 36; 167, 175). Her roommate, however, delivered the message incorrectly and merely informed Carey that Dye would not report for work until noon (R. 36; 222). The departure of the train was delayed for several hours, and Mrs. Dye did not report for work that afternoon (R. 36; 167). She returned to work the following Mon-

day morning and, although she tried to explain her absence to Foreman Carey, he refused to listen (R. 36; 176). On the following Monday, upon instructions from Evert, Carey discharged Dye for the asserted reason that her absences from work had been too frequent (R. 36; 169, 297, 303). Only a short time before her discharge Assistant Foreman Briggs had praised her work and asked her to assist in training new employees (R. 34–35; 166). Foreman Carey also commended her work as well as her attitude (R. 35; 169–170, 304–305). On May 7, 1943, just three days prior to her discharge, Carey had asked her to suggest an employee best qualified to operate the bottling machine (R. 166). Dye had joined the Union on May 6, started soliciting memberships on May 7, and within a few days had secured fifteen applications for the Union (R. 36; 166–168).

On the foregoing findings the Board concluded (R. 42, 49) that petitioner had discriminated in regard to the hire and tenure of employment of McDaniel and Dye, in violation of Section 8 (3) and (1) of the Act, and ordered their reinstatement with back pay. The court below entered a decree of enforcement (R. 428–429).

ARGUMENT

Th sole question presented is whether the Board's conclusion that petitioner had discharged employees McDaniel and Dye because of their

union membership and activities, and in violation of Section 8 (3) and (1) of the Act, is supported by substantial evidence. No question of general importance is involved, and the evidence summarized in the Statement, pp. 2–8, *supra,* affords ample support for the challenged findings.

In cases such as this the Board must appraise the relevant facts in the light of their background as part of a "pattern of events," and not as isolated fragments. *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 588; *Virginia Electric and Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 539. The Board was not required to consider only those events immediately connected with the discharges of Dye and McDaniel, "divorced from the events immediately preceding and following" such discharges. *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 78. The court below properly concluded that the credibility of the witnesses, the weight of the evidence, and the inferences to be drawn therefrom, were for the Board to determine; and although the evidence was conflicting and would have supported a contrary finding, there was clearly sufficient support for the finding which was made. *National Labor Relations Board* v. *Nevada Consolidated Copper Corporation,* 316 U. S. 105, 107.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
THOMAS B. SWEENEY,
Attorneys,
National Labor Relations Board.

SEPTEMBER 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1944